IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-427

RALPH M. KOONTZ,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Ralph M. Koontz, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Claims entered in this proceeding on April 26, 1977.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Claims, in the matter of *Ralph M. Koontz v. United States,* appears in the Appendix to this Petition (1-A). The opinion in

the Court of Claims in the matter of *Joseph H. Jankowitz v. United States* is reported at 209 Ct.Cl. 489, 553 F.2d 538 (decided April 14, 1976) (3a).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. 1255(1) to review the final order of judgment of the United States Court of Claims entered in this case on April 26, 1977. This Petition for Certiorari was filed within the period of time prescribed by 28 U.S.C. §2101(C), as extended to September 16, 1977, by an order entered by Mr. Justice Brennan on July 15, 1977.

QUESTIONS PRESENTED

1. Did the Court of Claims in granting Respondent's motion for judgment on the pleadings, thereby denying Petitioner a plenary hearing on the merits of his claim, deny Petitioner due process of law?

2. Did the Court of Claims deny Petitioner due process of law in failing to find his suspension from government "unwarranted and unjustified" under 5 U.S.C. §5596, and in failing to award Petitioner back pay?

3. Is the Court of Claims' interpretation of the provisions of 5 U.S.C. §5596, permitting a denial of Petitioner's appeal for a hearing and back pay, repugnant to Article I, §9, Cl. 3 of the United States Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Article 1, §9, Cl. 3 of the Constitution of the United States,

"No Bill of Attainder *** shall be passed."

2. The Fifth Amendment of the Constitution of the United States,

"No person shall be *** deprived of *** property without due process of law; ***

3. 5 U.S.C. §7501, the Lloyd-LaFollette Act

4. 5 U.S.C. §559.6), §7501, the Back Pay Act of 1966

5. 5 C.F.R. 772.301, *et seq.*
5 C.F.R. 550.803, *et seq.*

6. Federal Personnel Manual Supplement (FPM) 752-1 S3-2a(2)
Federal Personnel Manual Supplement (FPM) 752-1, S7-1c(2)

STATEMENT OF THE CASE

This is an appeal by Petitioner, Ralph M. Koontz, from an order from the United States Court of Claims dismissing his petition for the loss of compensation and allowances which he suffered when, as an employee of the United States, he was suspended indefinitely without pay from his employment with the Department of Housing and Urban Development (HUD), on the basis of a federal conspiracy indictment, of which he was subsequently acquitted.

Petitioner Koontz was initially employed by HUD in July, 1969, as a legislative assistant in Washington, D.C., and later as an Assistant to the Director of the Jacksonville, Florida area office. He remained in this Civil Service GS-14 classified position with competitive status through July 10, 1974, when he was indicted on one count of conspiracy by a grand jury of the United States District Court, Middle District of Florida, Jacksonville Division, in a criminal action styled *U.S. v. Edward J. Gurney, et*

al. (Crim. 74-122 CR-J-K). There were six other co-defendants and 42 unindicted co-conspirators.

On August 8, 1974, the Respondent, through the appropriate HUD officials (22a), notified Petitioner that he would be suspended from his employment without pay, effective August 13, 1974, pending the disposition of the criminal trial. Petitioner unsuccessfully protested this action when proposed (25a).

On August 6, 1975, a jury of the United States District Court for the Middle District of Florida, Tampa Division, acquitted the Petitioner of the charge against him. HUD, thereupon, on its own initiative, and without a hearing, promptly notified Petitioner that his suspension was terminated effective August 6, 1975, the date of acquittal. Petitioner was returned to work with pay status, and has remained so to the present date.

On October 6, 1975, Petitioner requested that HUD grant him back pay and allowances amounting to $31,-223.86 plus other benefits, which is the amount he would normally have earned had he not been involuntarily suspended without pay from August 23, 1974 through August 6, 1975. This request was denied by Carla Hills, the Secretary of Housing and Urban Development on November 21, 1975 (26a). Petitioner also sought relief from the Comptroller General with substantially the same result (27 & 28a).

Petitioner then brought this action in the United States Court of Claims. The basis for federal jurisdiction in the court of first instance, the United States Court of Claims, in its cognizance over the Back Pay Act of 1966, 5 U.S.C. §5596; 28 U.S.C. §1491; 5 C.F.R. 550.803(c).

At the close of the pleadings, and without completion of discovery, oral argument, or a plenary hearing on the

merits of the case, that Court sustained Respondent's motion for judgment on the pleadings. The Court's decision (1a) rests entirely on the finding that the issues of such a claim were fully explored in *Jankowitz v. U.S.*, 553 F.2d 538 (1976) (3a), and based on the precedent, Petitioner was not entitled to recover. From that ruling Petitioner brings this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF CLAIMS DENIED PETITIONER DUE PROCESS OF LAW WHEN IT GRANTED RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS, THEREBY DENYING PETITIONER A PLENARY HEARING ON THE MERITS OF HIS CLAIM.

In *Arnett v. Kennedy*, this Court held that a non-probationary federal employee may be suspended without pay without a prior hearing on the merits of the charge for which he was suspended. 416 U.S. 134 (1974). Central to the Court's finding that such a procedure does not deprive federal employees of their Fifth Amendment "property interest" in continued employment without due process of law, is the fact that if a post-suspension hearing results in the employee's reinstatement, he receives "full back pay, less any amounts earned by him through other employment . . ." 416 U.S. at 146 and 170 (citing 5 U.S.C. §5596).

In his concurring opinion in *Arnett*, Mr. Justice Powell noted:

> "Since appellee would be reinstated and awarded backpay if he prevails on the merits of the claim, appellee's actual injury would consist of a temporary interruption of income during the interim. To

be sure, even a temporary interruption of income could constitute a serious loss in many instances." 416 U.S. at 159.

Because the opportunity for such redress was afforded, the interest of the private party did not outweigh the government's purpose and interest. 416 U.S. at 168; see also, *Cafeteria and Restaurant Workers v. McElroy,* 367 U.S. 886 (1961).

The opportunity for post-removal exoneration so crucial to preservation of a federal employee's Fifth Amendment rights to due process is provided by the reinstatement procedure promulgated under the Lloyd-LaFollette Act (38a) and the Back Pay Act of 1966, 5 U.S.C. §5596; (36a) §7501; 5 C.F.R. 772.301, 307, *et seq.* (39a); 5 C.F.R. 550.803, 804, *et seq.* (35a-39a).

Here your Petitioner was reinstated to his position of employment by HUD without having to resort to a reinstatement hearing, but he does seek and has been denied the complete restoration which might be had by a plenary hearing on the merits of his case and an award of back pay.

The Back Pay Act of 1966 provides that such an award may be made by an "appropriate authority under applicable law or regulation." This authority is vested in the U.S. Court of Claims. 5 U.S.C. §5596; 28 U.S.C. §1491; 5 C.F.R. 550.803(c). It is Petitioner's contention that his acquittal of the criminal charge against him by the U.S. District Court vitiated the basis for his removal from employment, and, in the absence of a separate adjudication to the contrary, rendered his suspension "unjustified and unwarranted" within the meaning of the Back Pay Act, 5 U.S.C. §5596(b). According to the Civil Service Regulations:

> "To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or or procedural defects after consideration of the

> equitable, legal and procedural elements involved in the personnel action." 5 C.F.R. 550.803(d).

As set forth in the order of the Court of Claims (1a), Petitioner's case was dismissed on the pleadings solely on authority of its decision in *Jankowitz v. U.S.,* 553 F.2d 538 (1976). This dismissal is analogous to the sustaining of a demurrer at common law, in which the court finds that the plaintiff is not entitled to recover even if the court accepts as true the facts he has pleaded. See Wright, Federal Practice and Procedure, §1368; *National Metropolitan Bank v. U.S.,* 323 U.S. 454 (1945).

His case having been subsumed into *Jankowitz,* Petitioner submits that the reasoning of that decision and the procedure it purports to validate are repugnant to the Fifth Amendment. In *Jankowitz,* as in Petitioner's case, the suspension from employment was based solely on the employee's indictment, not on alleged acts underlying the indictment. 533 F.2d at 542. The importance of this fact is illustrated in provisions of the Federal Personnel Manual governing causes for suspension under the Lloyd-LaFollette Act:

> "(2) If the reason relied on is a criminal indictment or conviction, rather than the commission of certain stated acts of wrongdoing, then a subsequent acquittal of the employee or a dismissal of the criminal charge will, in effect, vacate the reason for action. On the other hand, if the reason relied on is the employee's acts of wrongdoing, generally the administrative action will not be affected by the subsequent court action on the criminal case (see *Bryant v. U.S., Croghan v. U.S., Finfer v. Caplin, Finn v. U.S., Holman v. U.S. and Prater v. U.S.*). However, the agency should give appropriate weight to testimony given during the criminal trial (see *Kowal v. U.S.*)." Federal Personnel Manual Supp. 752-1, S7-1c(2) [see also, Federal Personnel Manual Supp. 752-1, S3-2a(2)].

Your Petitioner concedes that the government may suspend an employee without pay for reasons less than a criminal conviction, provided those reasons are assigned, stated and substantial. See *Arnett*, 416 U.S. 160, 161. But he contends that when the government elected to base his suspension without pay solely on the fact of an indictment, his acquittal retroactively destroyed the legal efficacy of his indictment as a basis for suspension, rendering that adverse personnel action "unwarranted and unjustified" within the meaning of the Back Pay Act. It should also be remembered that the judgment of Petitioner's acquittal is the *only* decision on the merits of the charge against him, and this should be controlling unless or until another adjudication results in a contrary determination. While Petitioner may, and does in his second argument herein, suggest that his acquittal forecloses in his favor any discussion of whether his suspension was "unjustified," at the very least he should be afforded a plenary hearing in a civil forum as to whether suspension without pay was merited by his actions. This contention is at the heart of Petitioner's claim that he has been deprived of his property interest without due process of law.

In *Jankowitz*, the Court of Claims never addressed this issue, in constitutional terms or otherwise. It cited in its decision several cases supporting the proposition that an acquittal of a criminal charge has no *res judicata* effect on a collateral personnel hearing. 533 F.2d at 542. But it did not inquire into, or offer precedent supportive of, the due process sufficiency of the procedures which resulted in the personnel action adverse to Mr. Jankowitz. It found that because the rules had been complied with at the time of *Jankowitz'* suspension, it made no difference for the purposes of the Back Pay Act whether or not he was acquitted. 533 F.2d at 544. Petitioner believes the

Jankowitz decision incorrectly made the government procedures self-validating, and that the decision is based on the same kind of "wooden distinction" decried by this Court in the *Roth* case. *Board of Regents v. Roth*, 408 U.S. 564 at 571 (1972); see also, *Egan v. U.S.*, 107 F.Supp. 564 (1952). As a public employee, Petitioner has a right to a hearing whenever he is deprived of the property interest of his employment, regardless of whether the hearing is held before or after the deprivation. *Perry v. Sindermann*, 408 U.S. 593 (1972); As Mr. Justice Powell observed in *Arnett*, to fail to afford such a hearing *at any time*, regardless of whether the denial is based on statute or regulations, is to misconceive the origin of and the right to due process. 416 U.S. at 167. Yet this is what happened to Petitioner.

II.

THE COURT OF CLAIMS DENIED PETITIONER DUE PROCESS OF LAW IN FAILING TO FIND HIS SUSPENSION FROM GOVERNMENT EMPLOYMENT "UNWARRANTED AND UNJUSTIFIED" UNDER 5 U.S.C. §5596, AND IN FAILING TO AWARD PETITIONER BACK PAY.

As an alternative to his first argument, Petitioner submits that even in the event the personnel actions taken in his case are found to be consistent with the principles of procedural due process, he was nonetheless denied substantive due process when the Court of Claims failed to award him back pay. The election of the government not to conduct a plenary hearing to determine whether Petitioner's suspension without pay was unjustified or unwarranted has the effect of binding the government to the results of the criminal trial. See 5 U.S.C. §5596; 5 C.F.R. 550.803(d); *Roth, supra*, 408 U.S. 564. The judgment of acquittal therefore foreclosed any other

determination but that the suspension was unauthorized and unwarranted, and the Court of Claims should have so found (22a; underscoring supplied by Petitioner).

III.

THE COURT OF CLAIMS' INTERPRETATION OF THE PROVISIONS OF 5 U.S.C. §5596, WHICH PERMITTED THE DENIAL OF PETITIONER'S APPEAL FOR A HEARING AND BACK PAY, IS REPUGNANT TO ARTICLE I, §9, CL. 3 OF THE UNITED STATES CONSTITUTION

The problem addressed here is, may a federal employee or class of them, having been indicted, suspended without pay only by reason of such indictment, and subsequently acquitted, be forever foreclosed from seeking redress under the Back Pay Act for the period of involuntary suspension by reason of the rule in *Jankowitz?* Specifically, can Petitioner Koontz here be barred from seeking back pay, under the authority of *Jankowitz?* This is only authority the Court of Claims relied upon in dismissing his claim. (See last paragraph, opinion below, *Koontz v. U.S.*)

It is Petitioner's contention that the failure of the Court of Claims to either award him back pay or conduct a plenary hearing on the merits of his claim is grounds for reversal based on Art. I, §9, Cl. 3 of the United States Constitution. That provision, which forbids the promulgation of Bills of Attainder, has been interpreted as requiring the invalidation of any statute which punishes a person or group of persons without benefit of trial. *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277 (1867). This principle has been the basis for the invalidation of a congressional act which attempted to deprive federal civil servants of their pay. *U.S. v. Lovett,* 328 U.S. 303 (1946).

Your Petitioner was entitled to a presumption of innocence of the charge against him, despite the existence of the criminal indictment which served as the basis for his suspension from duty without pay. *Morissette v. U. S.,* 342 U.S. 236 (1952). His acquittal simply affirmed that innocence.

Suspension from federal employment without a prior hearing has been upheld by this Court in its interpretation of the Lloyd-LaFollette Act, where an employee's property rights are otherwise protected. *Arnett, supra,* 416 U.S. 134; 5 U.S.C. §7501. In the light of that decision, an interpretation of the Back Pay Act of 1966 which would deny Petitioner and others similarly situated an opportunity to litigate or be heard on entitlement to back pay would effectively construe that Act in a manner repugnant to the Article I prohibition against Bills of Attainder. See *Arnett,* 416 U.S. at 166, 167; *Lovett, supra,* 328 U.S. at 316; 5 U.S.C. §5596.

Petitioner and those like him have a property interest in *continued* employment, *Sindermann, supra,* 408 U.S. 593. If they may be removed from that employment without a prior hearing and later unilaterally reinstated without resort to a hearing under the Lloyd-LaFollette Act and its regulations, how are their rights to continued employment wholly protected? Petitioner must at least be given an opportunity to challenge, in a hearing pursuant to the Back Pay Act, the deprivation of his right to livelihood during the time of his suspension. To deny him this opportunity would convert the two acts into a vehicle for punishing Petitioner without benefit of a plenary hearing, much as would a Bill of Attainder. Because it is a cardinal rule of statutory interpretation that a law is to be construed in a manner consistent with the Constitution, this Court is urged to review the Koontz decision of the Court of Claims. See *Lovett, supra,* 328 U.S. at 329.

CONCLUSION

For the reasons stated herein, Petitioner prays that this Petition be granted and a Writ of Certiorari issue to review the decision of the United States Court of Claims.

Respectfully submitted,

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Attorney for Petitioner.

CERTIFICATE OF SERVICE

This is to certify that I have mailed three (3) copies of the Petition for Writ of Certiorari, postage prepaid, to the Respondent, The Honorable Wade McCree, Solicitor General of the United States, U.S. Department of Justice, Washington, D.C. 20530, this 16th day of September, 1977.

_____

John H. Gullett

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

RALPH E. KOONTZ No. 151-76

v.

THE UNITED STATES

John H. Gullett, attorney of record, for plaintiff, *Gullett & Hines,* of counsel.

R. W. Koskinen, with whom was *Assistant Attorney General Rex E. Lee,* for defendant.

ORDER

This case is before the Court on defendant's motion under Rule 38(c) for judgment on the pleadings. Plaintiff is a civilian employee of the Department of Housing and Urban Development (HUD) and seeks back pay, differentials, and allowances he would have earned during the period August 13, 1974, through August 6, 1975, while suspended indefinitely from his employment on account of an indictment against him on criminal charges by a Federal grand jury. Upon receipt of the notice of proposed suspension, plaintiff protested it unsuccessfully.

On December 19, 1974, plaintiff was notified of a proposed action to change his position from Assistant to the Director of HUD's office in Jacksonville, Florida, a GS-14 position, to that of Program Analyst, GS-12. Defendant again protested to no avail, and he was reclassified at the lower grade, effective January 19, 1975.

Plaintiff was brought to trial in the action styled *United States v. Gurney, et al.,* Crim. No. 74-122 CR-J-K, in the United States District Court, Middle District of Florida, and after a trial lasting many months he was acquitted by the jury on August 6, 1975. Plaintiff's sus-

pension was terminated as of said date, and he was returned to duty, but was denied any back pay and allowances for the period of his suspension. Plaintiff tells the court that he is entitled to approximately the sum of $31,223.86 for the period claimed, and that defendant's personnel actions have been unlawful as to him. The prayer for relief in the petition does not specifically contest plaintiff's reclassification, and we are pointed to no procedural errors therein. Defendant asserts as affirmative defenses, failure of the petition to state a claim upon which relief can be granted and that the claim is abrred by plaintiff's failure to exhaust his administrative remedy. We note, also, plaintiff has not alleged that his suspension was arbitrary and capricious. Plaintiff does suggest, however, that he can show, upon completion of discovery, that defendant's treatment of him has not been even-handed.

The legality of an indefinite suspension of employment because of a criminal indictment was fully explored in our opinion in *Jankowitz v. United States,* 209 Ct. Cl. 489, 533 F.2d 538 (1976), where we found that such a procedure taken in go od faith and in accordance with applicable civil service procedures must be sustained. We know of no authority to the contrary and plaintiff has shown us none.

Upon consideration of the petition and supporting papers, defendant's motion, plaintiff's opposition thereto, and defendant's reply brief, without oral argument,

IT IS ORDERED, upon the authority of *Jankowitz, supra,* that defendant's motion for judgment on the pleadings is granted, and the petition is dismissed.

BY THE COURT
/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

In the United States Court of Claims

No. 83-75

(Decided April 14, 1976)

JOSEPH H. JANKOWITZ v. THE UNITED STATES

Herbert A. Levy, attorney of record, for plaintiff. *Allen Lashley*, of counsel.

Leslie H. Wiesenfelder, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *Alexander Younger*, of counsel.

Before SKELTON, NICHOLS, and BENNETT, *Judges.*

ON PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS AND ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

BENNETT, *Judge*, delivered the opinion of the court:

In this civilian pay case plaintiff sues under the Back Pay Act of 1966, 80 Stat. 94, 95, 5 U.S.C. § 5596 (1970), and 28 U.S.C. § 1491 (1970), seeking pay and allowances which he would have earned had he not been made the object of an adverse personnel action.[1] Defendant has lodged in its re-

[1] 5 U.S.C. § 5596(b) (1970) provides, in pertinent part:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority * * * to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned * * * if the personnel action had not occurred, less any amounts earned by him through other employment during that period; * * *."

sponsive pleading an affirmative defense of setoff of damages for "deceit," as the alternative to its first counterclaim, under the False Claims Act, 31 U.S.C. § 231 *et seq.* (1970), as well as a second counterclaim for return of alleged bribes, gratuities, kickbacks, and similar illegal payments to plaintiff. Defendant invokes our jurisdiction of its counterclaims pursuant to 28 U.S.C. § 1503 (1970).

At all relevant times prior to March 28, 1972, plaintiff was employed as an appraiser, GS–11, step 7, $15,973 per annum, in the Federal Housing Administration (FHA), Department of Housing and Urban Development (HUD), at a location in the State of New York. On that date he was indicted by a grand jury in the United States District Court for the Eastern District of New York. The indictment charged plaintiff with having received two separate illegal payments of $100 each in return for being influenced in his official acts as an appraiser in connection with the premises known as 260 51st Street, Brooklyn, New York.

On March 31, 1972, plaintiff's employer transmitted to him an advance notice of proposed indefinite suspension without pay during the pendency of the criminal action. The reason cited for this action was: "You were indicted by the Federal Grand Jury for the United States District Court, Eastern District of New York, on or about March 28, 1972 * * * for accepting bribes." Plaintiff made a written reply on April 3, 1972, but it was ineffective and indefinite suspension without pay was imposed on April 6, 1972. After a hearing was conducted on June 1, 1972, the New York Regional Office of the Civil Service Commission, by order dated July 5, 1972, approved both the substantive and procedural aspects of plaintiff's suspension. That office recognized in its decision that the suspension was based upon the fact of plaintiff's indictment, and not upon any separate administrative charge to the effect that plaintiff was actually guilty of the bribery as alleged by the grand jury. The Civil Service Commission's Board of Appeals and Review affirmed on November 13, 1972.

Just over 1 month prior to final Civil Service Commission action on his administrative appeal, on October 1, 1972, plaintiff went on trial in the Eastern District of New York.

The trial involved 23 defendants charged on 211 separate counts, and lasted from October 1, 1973, to June 18, 1974, ending in plaintiff's acquittal of all charges by a jury verdict and judgment entered June 18, 1974. Plaintiff conceded at argument that during the entirety of the trial he was unavailable for the performance of his job.

On June 19, 1974, plaintiff reported to his employer for duty and requested reinstatement. By notification of personnel action dated December 13, 1974, plaintiff was officially returned to duty, effective retroactively to June 19, 1974, at a salary commensurate to GS–11, step 7. Plaintiff has never been paid for the period between June 19, 1974, when he presented himself for duty, and the date he actually returned to work, November 5, 1974. Defendant concedes plaintiff's entitlement to judgment for this period only. For the period of indefinite suspension without pay between April 6, 1972, and June 19, 1974, plaintiff was not paid and claims it here. Effective February 20, 1975, plaintiff retired from the service for disability and he brought this suit on March 24, 1975.

Relative to defendant's affirmative defense and counterclaims certain additional facts must be taken into account. The alleged illegal payments to plaintiff are said to have been made on or about October 31, 1968, and January 30, 1969. Defendant avers that in return for such illegal payments plaintiff intentionally inflated his appraisal of the land and improvements at 260 51st Street, Brooklyn, New York, from $16,150 to $23,850. Plaintiff admits only increasing the appraisal. Defendant says further that FHA insured against default upon indebtedness secured by this property in an excessive amount reflecting plaintiff's inflated appraisal. Such default did occur, so far as the application for insurance benefits indicates, not earlier than January 1970. Thereafter, insurance benefits out of proportion to the reasonable value of the collateral were paid and the Secretary of HUD acquired title to the property as well as an assignment of the paper embodying the defaulting party's obligations to the mortgagee/assignor. The application for such insurance benefits, dated February 15, 1973, was presented to FHA on February 22. Defendant's counterclaims were filed on May 23, 1975. Therefore, between the date of the alleged illegal

payments and the filing of these counterclaims there expired a period in excess of 6 years. Between the date of the obligor's default and the filing of the counterclaim, 5 years and nearly 5 months elapsed. Between the filing of the claim for FHA insurance benefits and the filing of the instant counterclaims, only 2 years and 3 months went by. Finally, defendant has provided an affidavit tending to prove that not until March 1970 were facts reasonably known to FBI investigators leading to discovery of plaintiff's alleged bribery.

Plaintiff now moves for summary judgment on his back pay claim and to dismiss the affirmative defense and counterclaims, on the ground that they are barred by applicable statutes of limitations. All other of plaintiff's arguments touching defendant's counterclaims have been abandoned. Defendant cross-moves for summary judgment as to plaintiff's back pay claim, and opposes plaintiff's bid for dismissal of both counterclaims. For the reasons stated below, we think that plaintiff's motion should be allowed insofar as it seeks summary judgment for back pay, but only for the period between June 19, 1974, and his actual return to work, as defendant has conceded. We have concluded, further, that the defendant's affirmative defense and counterclaims are not barred by applicable statutes of limitations. Accordingly, to this extent plaintiff's motion should be denied.

I

Plaintiff as moving party encounters the burden of demonstrating his entitlement to summary judgment for back pay as a matter of law. Rule 101(d); *e.g.*, *Housing Corp. of America* v. *United States*, 199 Ct. Cl. 705, 710, 468 F. 2d 922, 924 (1972). As we have seen, the Back Pay Act of 1966 authorizes us to make such an award only where it appears that the plaintiff has undergone "an unjustified or unwarranted personnel action."[2] In accordance with statutory authority conferred by 5 U.S.C. § 5596(c) (1970), the Civil Service Commission heretofore has adopted regulations interpreting this statutory language:

(d) To be unjustified or unwarranted, a personnel

[2] *See note 1, supra.*

action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action. [5 C.F.R. § 550.803(d) (1975).]

Within this framework the moving party here must particularize for us the way in which his indefinite suspension from duty without pay was unjustified or unwarranted.

Plaintiff relies principally upon the position that his suspension from duty without pay was unjustified and unwarranted because procedurally defective. He calls our attention to the undisputed fact, previously mentioned, that his advance notice of proposed indefinite suspension cited his *indictment* as its basis; not the acts underlying the indictment—alleged bribery. Since the personnel action was bottomed upon the indictment itself, and not upon the alleged criminal acts, plaintiff presses upon us the view that his acquittal in effect retroactively destroyed the legal efficacy of his indictment as a basis for adverse personnel action. At first blush this notion seems extravagant indeed; we have held on many occasions that in the normal case acquittal of a criminal charge does not lead inexorably to the conclusion that an adverse personnel action was unjustified or unwarranted, where based upon the same alleged conduct. *E.g.*, *Holman* v. *United States*, 181 Ct. Cl. 1, 383 F. 2d 411 (1967); *Prater* v. *United States*, 172 Ct. Cl. 608 (1965); *Finn* v. *United States*, 152 Ct. Cl. 1 (1961); *Bryant* v. *United States*, 122 Ct. Cl. 460 (1952), *cert. denied*, 344 U.S. 913 (1953); *Croghan* v. *United States*, 116 Ct. Cl. 577, 89 F. Supp. 1002, *cert. denied*, 340 U.S. 854 (1950). We have approved the principle just stated because of the different standards of proof prevailing in criminal prosecutions and adverse personnel actions.

Plaintiff believes the instant case to be different, however, in that the indictment itself was offered as the reason for proposed indefinite suspension. He has referred us to certain provisions in the Federal Personnel Manual (FPM) to support his contention that acquittal vitiated the cause for action against him.

S3–2 INSUFFICIENT CAUSE

a. *Pitfalls to avoid.* Agencies should be alert to avoid such errors as the following:

* * * * *

(2) *Cause based on criminal indictment.* Except when the agency suspends an employee indefinitely pending disposition of a criminal action, the agency should not base an adverse action on a criminal indictment or conviction. Instead, the agency should base the action on what the employee did that was wrong. If the cause relied on is a criminal indictment * * *, then a subsequent acquittal of the employee * * * would, in effect, vacate the cause for action. However, if the cause relied on is the employee's acts of wrongdoing, generally the administrative action will not be affected by the subsequent court action on the criminal case. [FPM Supp. 752–1, S3–2a(2) (1972).]

Much the same language is repeated in FPM Supp. 752–1, S7–1c(2) (1972), located in subchapter S7, Notice of Decision. We think plaintiff's mistake resides in taking the wording of these provisions at face value, neglecting to consider whether they really apply to the facts of his case. Defendant in contending that we should not deem ourselves bound by the FPM, since that publication does not arise to the dignity of regulations having the force and effect of law, also appears not to have faced the question of whether the quoted language applies here. There is no need to decide whether such FPM provisions are regulations binding upon the agency in the sense understood by the Supreme Court in *Service* v. *Dulles*, 354 U.S. 363 (1957).[3] In our judgment the employing agency complied with all guidelines of the FPM which do apply, and the passages cited by plaintiff have no bearing upon the facts of the instant case.

It will be noticed upon examination of the language in

[3] So far as our research discloses, this question remains open to the most serious judicial doubt. *See Piccone* v. *United States*, 186 Ct. Cl. 752, 762 n. 12, 407 F. 2d 866, 871–72 n. 12 (1969). Judge Nichol's concurring opinion in *Piccone* is most instructive on this point. 186 Ct. Cl. at 770 *et seq.*, 407 F. 2d at 876 *et seq.* *See also Monzi* v. *United States*, 198 Ct. Cl. 489 (1972); *Nordstrom* v. *United States*, 169 Ct. Cl. 632, 638, 342 F. 2d 55, 59 (1965); *Brennan* v. *Ace Hardware Corp.*, 495 F. 2d 368, 376 (8th Cir. 1974).

FPM Supp. 752–1, S3–2a(2), *supra*, that an agency "should not base an adverse action on a criminal indictment or conviction," "[*e*]*xcept when the agency suspends an employee indefinitely pending disposition of a criminal action.*" [Emphasis supplied.] Since plaintiff's employer here *did* suspend him indefinitely during the pendency of the criminal case, the general rule of S3–2a(2) simply had no application. Thus, it was entirely proper to predicate such indefinite suspension solely upon the fact of indictment. As the advance notice itself states, HUD reserved the right to institute a *second* adverse action, looking toward removal, should the facts disclosed by investigation have warranted that step. Moreover, we think this procedure to have been eminently fair to plaintiff. Recognizing that he might well be acquitted, the agency even-handedly rejected the "knee-jerk" approach, giving plaintiff a chance to save his job if exonerated.

Our conclusion in this regard is fortified by reference to other passages in FPM Supp. 752–1, upon which the employing agency obviously relied, but to which we have not been referred by the parties. FPM Supp. 752–1 S5–3b (1972) provides, in part:

b. "*Crime*" *provision.* (1) When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the agency may give the employee less than 30 days' advance written notice. * * *.[4]

* * * * *

(3) * * * [A] difficulty in applying the crime provision is to determine what constitutes reasonable cause for believing that an employee is guilty. An agency cannot invoke the "crime" provision solely on evidence that the employee was arrested. However, if the agency has evidence that the employee * * * was indicted by a grand jury, then the agency would have reasonable cause for believing the employee guilty of the crime (see sample notice B–7). * * *.[5]

[4] This language reflects the wording of 5 U.S.C. § 7512(b)(1) (1970) and 5 C.F.R. § 752.202(c)(2) (1972).

[5] The advance notice received by plaintiff in this case is practically identical to the one recommended and set out in the FPM at sample notice B–7.

In S5–4, Duty Status During Notice Period, the following provisions appear:

> *c. Emergency situations under subpart B.* * * *.
> (2) *Use of "crime" provision.* When an agency believes an employee should not remain on the premises and can invoke the crime provision, it is better practice to shorten the notice period and process only one action—a removal or an indefinite suspension * * *. Generally, to invoke the crime provision and process a removal or indefinite suspension with a curtailed notice period an agency would:
> —Notify the employee he is being put immediately in a nonduty status with pay for no longer than five calendar days.
> —Give the employee notice * * * of * * * proposed indefinite suspension pending disposition of the criminal action * * *.
>
> * * * * *
>
> If the agency decides to suspend the employee and later, after the resolution of the criminal charges decides to remove him, it must initiate a new adverse action to remove the employee. * * *.

In our estimation, plaintiff's employer followed the FPM scrupulously, including adopting an advance notice of proposed indefinite suspension almost identical to that set out as an example in FPM Supp. 752–1, sample form B–7. Since we find that the Government in fact followed all applicable procedural recommendations and safeguards in the FPM, we do not agree that plaintiff's indefinite suspension without pay was either unjustified or unwarranted. This much of plaintiff's claim for back pay must fail. However, in accord with the Government's concession, plaintiff is entitled to a judgment for back pay between the official date of his reinstatement, June 19, 1974, and the date of his actual return to work later in that year. To this extent only plaintiff's motion for summary judgment will be allowed.

II

As noted, the Government has asserted a counterclaim under the False Claims Act, 31 U.S.C. § 231 *et seq.*[6] Plaintiff

[6] 31 U.S.C. § 231 (1970) provides in part:
"Any person * * * who shall * * * cause to be made * * * or cause to be presented * * *, for payment * * * any claim upon or against the Government * * * knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of * * * aiding to obtain the payment or approval of such claim, makes * * * any false * * * certificate * * * knowing the same to contain any fraudulent or fictitious statement or entry * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act * * *."

This court has subject matter jurisdiction of the counterclaim under 28 U.S.C. § 1503 (1970). *Brown* v. *United States*, 207 Ct. Cl. 768, 785, 524 F. 2d 693, 703 (1975).

replies that this approach may not be considered on the merits, since any rights appurtaining to the Government under that Act are time-barred by the applicable statute of limitations, 31 U.S.C. § 235 (1970):

> Every suit shall be commenced within 6 years from the commission of the act, and not afterward.

Defendant's theory of liability is that in taking illegal payments and rendering an inflated appraisal, plaintiff knowingly caused a false, fictitious, or fraudulent claim to be made upon or against the United States within the meaning of 31 U.S.C. § 231 (1970). In defendant's view, the "act" which accrues a cause of action is the filing of the application for FHA insurance benefits by the mortgagee. Since this document was filed on February 22, 1973, and the counterclaim interposed here on May 23, 1975, defendant asserts that its claim is not barred. Plaintiff responds by maintaining that the "act" is not the filing of the claim, but that the term has reference to the alleged conduct of the person ultimately causing such a claim to be served upon the Government. As plaintiff would have it, therefore, the cause of action accrued to the Government, if at all, at the time of the alleged illegal payments. It has been observed heretofore that more than 6 years elapsed between the date of alleged bribery and the filing of the counterclaim. This dispute requires us to examine the meaning of the term "act" as used in 31 U.S.C. § 235. Whatever its meaning, this event precipitates immediate accrual of the Government's cause of action enumerated in section 231, requiring the claim to be filed within 6 years thereof.

The authorities relevant to this question seem to fall into three categories: (1) cases holding that the "act" does not occur until actual filing of a claim against the Government; (2) a decision stating that the cause of action does not accrue

until the insured loan goes into default; and (3) a single opinion suggesting that a right of action under the False Claims Act does accrue, as plaintiff contends, upon the completion of the acts of the person sued, where such acts ultimately cause another to file a false, fraudulent, or fictitious claim against the Government. As to categories (1) and (2), in the case at bar, both the filing of the claim for insurance benefits and the default upon insured indebtedness occurred within 6 years next preceding the filing of defendant's counterclaims. We need decide only whether the phrase "commission of the act," as used in 31 U.S.C. § 235 (1970) and as applied to this case, requires the conclusion that defendant's False Claims Act rights accrued if at all when the plaintiff allegedly received the illegal payments. If so, the counterclaim is barred; if not, it must be remanded for trial.

Decisions indicating that the "act" for purposes of this statute is the actual filing of a false, fictitious, or fraudulent claim (presumably notwithstanding the earlier acts of another which cause such a claim to be filed) include *United States* v. *Ekelman & Assoc., Inc.*, —— F. 2d —— (6th Cir., March 12, 1976), *United States* v. *Ridglea State Bank*, 357 F. 2d 495 (5th Cir. 1966), *United States* v. *Howell*, 318 F. 2d 162 (9th Cir. 1963), *United States* v. *Ueber*, 299 F. 2d 310 (6th Cir. 1962), and *United States* v. *Globe Remodeling Co.*, 196 F. Supp. 652 (D. Vt. 1960) (supp. opin. 1961 at 657).[7] For our purposes we need refer only to the last of these five. In *Globe Remodeling Co.* the court said:

> The claim of a lending institution for payment on the guaranty obligation by the Federal Housing Administration is a false claim for the purposes of the False Claims Act when the guaranty obligation was induced by one or more false statements in a credit application or completion certificate. [Citation omitted.] The statute of limitations * * * for causing such a false claim to be presented for payment, commences when the claim for payment on the guaranty obligation is presented * * *. [196 F. Supp. at 655.]

[7] We may conveniently place in a subcategory within this line of decisions two cases holding that the cause of action does not accrue until such time as the false claim against the Government is finally paid. *E.g. United States ex rel. Vance* v. *Westinghouse Elec. Corp.*, 363 F. Supp. 1038 (W.D. Pa. 1973); *United States* v. *Klein*, 230 F. Supp. 426 (W.D. Pa. 1964), *aff'd*, 356 F. 2d 983 (3d Cir. 1966).

This line of decisions has the aspect of certainty in application to commend it. Yet it may be difficult to accede to the idea that a claim filed by a third party (in our case the FHA mortgage insurance beneficiary) is an "act" of a defendant whose conduct made the submission of the claim possible.

The second group of these authorities, looking to the default upon insured indebtedness rather than to the conduct of the person against whom the claim is pressed or the filing of the claim itself, is exemplified by *United States* v. *Goldberg*, 256 F. Supp. 540 (D. Mass. 1966). In that case defendant allegedly made false loan applications to various banks, on the basis of which FHA-insured loans were disbursed. Rejecting the argument that the claim accrued upon submission to the bank of a false loan application, the court said:

> * * * [T]he essence of the cause of action is that the defendant caused a claim for payment to be presented to the United States and that act occurred when the defendant defaulted on the loans. This conclusion is reinforced by the Supreme Court's holding in *United States* v. *McNinch* [citation omitted] that until there has been a demand for money on the public treasury there is no claim within the scope of the False Claims Act. Consequently, I rule that the "act" from which the statute runs was the default, not the filing of false [loan] applications, and that the action is timely. * * *. [256 F. Supp. at 541–42.]

The *Goldberg* decision is more akin to the case at bar than the cases cited in category (1), involving as it does the prompting by one party of the false claim of another. It might be said with considerable logical force that until such time as a false claim or demand actually is prompted by default upon insured indebtedness, the "act" of the party being sued remains inchoate or is not committed for purposes of the statute of limitations codified at 31 U.S.C. § 235 (1970). Only upon default can it be said with relative certainty that a false claim will be forthcoming.

Our research disclosed as well the recent decision of *United States* v. *Bornstein*, 44 U.S.L.W. 4078 (Jan. 14, 1976), wherein the Supreme Court selected certain language which might be thought to lend support to the position of plaintiff—that a cause of action under 31 U.S.C. § 231 accrued,

if at all, at such time as illegal payments allegedly were made. Therefore, we might place this decision in a third category. However, the statute of limitations was not in issue. The Court was called upon to decide how many $2,000 forfeitures should be imposed under 31 U.S.C. § 231 where the defendant subcontractor had knowingly made three shipments of deficient electron tubes for use in the performance of one prime contract, which deficiency in quality ultimately caused the Government to pay the entire amount of 35 invoices at the full contract price presented by its prime contractor. The complaint sought 35 $2,000 forfeitures, *i.e.*, one for each invoice provided to the Government. The defendant subcontractor's position was that there could be only one $2,000 forfeiture since there was only one prime contract pursuant to which false, fraudulent or fictitious invoices were served.

A divided court (5–3), speaking through Mr. Justice Stewart for the majority, could accept neither approach. In rejecting the Government's position that fully 35 forfeitures had occurred, the Court said:

> * * * The difficulty with this position is that it fails to distinguish between the acts committed by Model [the prime contractor] and the acts committed by United [the subcontractor and defendant]. [Footnote omitted.] The distinction is a critical one, because the statute imposes liability only for the commission of acts which cause false claims to be presented. [—— U.S. at ——, 44 U.S.L.W. at 4080.]

The Court was of the opinion that three statutory forfeitures had taken place:

> A correct application of the statutory language requires, rather, that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures. In the present case United [the subcontractor and defendant] committed three acts which caused Model [the prime] to submit false claims to the Government—the three separately invoiced shipments to Model. * * * Thus, United's three shipments of falsely branded tubes to Model caused Model to submit false claims to the United States, and United is thus liable for three $2,000 statutory forfeitures representing the three separate shipments that it made to Model. [Footnote omitted.] [—— U.S. at ——, 44 U.S.L.W. at 4081.]

It is true that *Bornstein* emphasizes the culpable conduct of the person causing the submission by another of a false, fictitious or fraudulent claim to the Government. Likewise, the opinion downplays the significance of the precise number of false invoices actually filed with the Government. Nevertheless, there are at least two good reasons for which we should hesitate to extend the *Bornstein* rationale to the facts of the case before us. First, as stated, the question was not when a cause of action accrued under 31 U.S.C. § 231. The problem was how many $2,000 forfeitures should be imposed. Yet the second reason is the most forceful of all. If a cause of action accrues to the Government in this case at the time of the alleged bribe and fraudulent reappraisal, it would be quite possible that in future cases Government claims under the False Claims Act could become time-barred before any demand had been made upon the Government at all or before the Government learned of the fraud. As we see it, assuming arguendo that plaintiff is guilty of the acts alleged, to a legal certainty it cannot be said that he caused any false claims whatever to be served on the Government at least until the obligor with respect to Government-insured indebtedness defaulted thereon. Default would not necessarily occur within 6 years of the inflated reappraisal. It is inconceivable to us that Congress intended to allow a false claimant to insulate himself from all liability merely by forestalling the time of filing such a claim until 6 years after the alleged fraudulent acts which make the filing possible. Yet such consequences would be the product of the holding plaintiff now seeks.

At the earliest, we think the Government's claim accrued at the time of the obligor's default. Since this event occurred less than 6 years prior to the filing of the Government's counterclaim it is not barred. We leave for another day the question of whether the cause of action accrues upon default or upon later filing of the application for insurance benefits. We hold that, in this case, the Government's cause of action did not accrue at the time of the alleged illegal payments to plaintiff.

A word must be added respecting defendant's affirmative defense of setoff. This defense charges plaintiff with deceit arising out of the same conduct alleged in the first counterclaim. Defendant concedes that this defense sounds in tort and relates to alleged conduct not germane to plaintiff's main action (for back pay), and as such, would encounter the 3-year time bar of 28 U.S.C. § 2415(b) (1970)[8] if pressed *other* than by way of offset. Plaintiff's motion to dismiss this affirmative defense must fail, inasmuch as 28 U.S.C. § 2415(f) (1970)[9] specifically authorizes defendant to assert by setoff its tort claim, in an amount not to exceed any recovery available to plaintiff. To this extent as well, plaintiff's motion must fail.

III

The Government's second counterclaim demands judgment in the amount of all bribes, kickbacks, secret emoluments, and other illegal payments allegedly made to plaintiff in connection with the inflated appraisal of the New York property. The counterclaim states a legally sufficient common law right of action recognized by the Supreme Court long ago:

> * * * The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity or benefit in violation of his duty, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received. [*United States* v. *Carter*, 217 U.S. 286, 306 (1910).]

[8] "Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: * * *."

[9] "* * * A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery."

Jurisdiction of such a counterclaim undoubtedly attaches in this court under 28 U.S.C. § 1503 (1970).[10]

Once again we are called upon by plaintiff's reply and motion to decide the ultimate question of whether this counterclaim is barred by the statute of limitations. Unlike the first counterclaim, we may assume that this cause of action accrued at the time of the alleged illegal payments. We have seen as well that 6 years passed between the dates of alleged payments and the filing of the counterclaim. Nonetheless, this counterclaim does not encounter the bar of the statute of limitations:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States * * * which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues * * *. [28 U.S.C. § 2415(a) (1970).]

28 U.S.C. § 2416 (1970) reads in part:

> For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—
>
> * * * * *
>
> (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; * * *.[11]

We think that the obligation of an agent of the Government to account to his principal for a payment illegally received, since premised upon an obligation created by law, and not upon the apparent mutual consent of the parties, derives from a contract implied in law within the meaning

[10] This statute provides:

"The Court of Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court."

The intent of this section is to permit the Government to have all controversies between it and the plaintiff litigated in one forum, once and for all. *Cherry Cotton Mills* v. *United States*, 327 U.S. 536 (1946).

[11] Plaintiff's contention that 28 U.S.C. § 2501 (1970) applies to counterclaims by the United States must be rejected. *Dugan & McNamara, Inc.* v. *United States*, 130 Ct. Cl. 603, 124 F. Supp. 650 (1954).

of 28 U.S.C. § 2415(a) (1970). *Cf. J. C. Pitman & Sons* v. *United States*, 161 Ct. Cl. 701, 705, 317 F. 2d 366, 368 (1963); *see* RESTATEMENT OF CONTRACTS 2d, § 5, comment *b* (Tent. Drafts Nos. 1–7, 1973); 1 S. WILLISTON, CONTRACTS § 3A at 14 (1957 ed.).[12] Moreover, defendant has placed before us an uncontroverted affidavit to the effect that not until March 23, 1970, were allegations received by the United States Attorney for the Eastern District of New York indicating the presence of a scheme by a mortgage company calculated to defraud the United States through false information on FHA mortgage insurance applications. Therefore, not until that date did the Government have actual knowledge of facts tending to indicate the presence of alleged fraud. Nothing in the record indicates that at any time prior to March 23, 1970, facts were reasonably available to defendant which would have provided constructive notice of such alleged illegal payments. To controvert the assertions of fact contained in an affidavit filed in support of a motion for summary judgment, or in opposition thereto, the party involved may not rely upon bare denials but must adduce by affidavits or otherwise evidence tending to place the disputed matter genuinely in issue. Rule 101(f); *Putnam Mills Corp.* v. *United States*, 202 Ct. Cl. 1, 15, 479 F. 2d 1334, 1341 (1973). On the basis of the uncontroverted affidavit and exhibits before us we conclude that the running of the limitation period set down in 28 U.S.C. § 2415(a) (1970) was tolled at least until March 23, 1970, under 28 U.S.C. § 2416(c) (1970), when facts first became known to responsible officials charged with investi-

[12] We are not unmindful of the principle that a plaintiff may not recover against the United States under the Tucker Act, 28 U.S.C. § 1491 (1970), where the claim is based solely on a contract implied in law. *Merritt* v. *United States*, 267 U.S. 338, 341 (1925); *J. C. Pitman & Sons* v. *United States*, 161 Ct. Cl. 701, 704, 317 F. 2d 366, 368 (1963). This rule derives from judicial construction of the Tucker Act, however, and our research has disclosed no similar authority which would bar recovery in favor of the United States upon this sort of implied contract where it chooses to interpose it by way of counterclaim under 28 U.S.C. § 1503 (1970). Indeed, one should hesitate to espouse such a view in light of the expansive language of the latter jurisdictional statute (*see* note 8, *supra*). In similar situations we have recognized that the Government may assert counterclaims in this court pressing causes of action of which we would have no subject matter jurisdiction, were the same claims placed before us by a plaintiff. *See, e.g., Continental Management, Inc.* v. *United States*, 206 Ct. Cl. ——, 527 F. 2d 613 (1975), wherein the Government's counterclaim, sounding in tort, was sustained even though the Tucker Act gives us no jurisdiction to hear tort claims filed here by plaintiffs.

gation of possible illegal payments to plaintiff. Therefore, the second counterclaim must be remanded for trial.

IV

In summary and conclusion, plaintiff's motion for summary judgment is allowed only to the extent that he is entitled to judgment for back pay commencing upon the date of his official reinstatement June 19, 1974, and ending with the date of his actual return to work on November 5, 1974. Defendant's motion for summary judgment is granted as to plaintiff's claim for back pay for the period of indefinite suspension, April 6, 1971–June 19, 1974, and as to this claim the petition is dismissed. Upon further consideration of plaintiff's motion we find that insofar as it seeks dismissal of defendant's first affirmative defense and first and second counterclaims, it should be and it is denied. Judgment for plaintiff is subject thereto and the case is ordered remanded to the trial judge pursuant to Rule 131 for further proceedings consistent with this opinion.

NICHOLS, *Judge*, concurring in part, dissenting in part:

This pay case presents us with interesting puzzles. Though first inclined the other way, I am persuaded by Judge Bennett's able analysis that the Civil Service Commission does not disapprove, but in fact recommends, that a person indicted for the reason Mr. Janokwitz was here should be suspended because of the indictment until the outcome of his trial. This assumes, of course, that the offense charged had such a connection with the job situation that it would be irrational to expect useful or dependable work from the employee until the charges were resolved. Suspension being a proper course to have taken, the unsuccessful outcome of the trial, from the Government's point of view, does not make the suspension from the beginning an "unjustified or unwarranted personnel action". To hold otherwise would read into the statute what is not in it.

I have more difficulty than he does with *United States* v. *Bornstein*, —— U.S. —— (slip op. January 14, 1976). This case construes the word "act" in the False Claims statute to

mean the false assertion of the initial violator. This is for the purpose of counting the number of "acts" penalized at $2,000 per "act", when the misstatements are passed onto the Government by a third party who may have been innocent. In *Bornstein* there were three false invoices by Bornstein's company, a subcontractor, to the prime contractor, causing thirty-five by it to the Government. Held, by the majority, there were three $2,000 "acts", not thirty-five. We must here construe the limitation provision which is very much in *pari materia* and bars suit for the forfeitures after six years from the "acts". How can we give the same word "act" a different meaning, employing ordinary and accepted techniques of statutory construction?

The only persuasive reason is that the interpretation consistent with *Bornstein* produces an absurd result which Congress could not have intended. It would cause limitations to run on some $2,000 forfeitures before the Government's claim even accrued. These results would occur in few cases and it is possible to argue, though not very persuasively, that Congress intended them. Plaintiff's counsel did so argue.

I think the reasons not sufficient for a non-literal interpretation. It is true, in everybody's favorite Supreme Court decision, *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892), it is said that statutes may be construed contrary to their literal language to avoid absurd results, contrary to the manifest intention of Congress. P. 459. But this is said in course of relieving the well-meaning but technically guilty church from a civil penalty. The authorities cited there deal with that situation. Thus at 459 Lord Coke is quoted:

> * * * "Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endamaged."

Here we are invited to fix up defective language to assess a penalty, not to relieve from one. In the very *Bornstein* decision that makes us the trouble, the Court notes at fn. 8, p. 9, slip op., that we are actually construing a criminal statute and that such provisions:

> "* * * must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in

> using those terms, particularly where they are broad and susceptible to numerous definitions." (Citing *United States* v. *McNinch*, 356 U.S. 595, 598 (1958).)

I read this to mean that a False Claims Act penalty must meet a double test. The assessment must be within the literal language *and* it must be within the Congressional intent as judicially conceived. Therefore, the designated culprit is not liable for the penalty if the literal language does not cover the case, even though Congress may have wanted to cover it and thought it had done so. I am constrained to hold that limitations on the $2,000 claims have run.

Ralph E. Koontz, Jacksonville Area Office
August 8, 1974

E. Lamar Seals
Office of the Regional Administrator, 4S

Decision to Suspend Indefinitely

The notice of July 15, 1974, informed you of a proposal to suspend you indefinitely pending disposition of your indictment by the courts no sooner than July 25, 1974. This notice was prepared in accordance with HUD Handbook 771.3 Revised, Paragraph 14(b), which states in pertinent part, "I*t is HUD policy* that, especially when HUD has evidence that the employee. . . was indicted by a grand jury, the notice of proposed adverse action to the employee shall indicate either that it is proposed to suspend him indefinitely or to remove him." (underscoring supplied)

Your reply to the July 15, 1974, notice has been received. You requested in your memorandum that you be afforded a hearing in connection with the proposal in accordance with applicable Civil Service regulations. Civil Service regulations provide in FPM Supplement 752-1, Subchapter 6, Part 2 e (1) that the agency is required to offer an employee a hearing if he appeals under the agency appeals system. It states further that "even when the agency has the policy of providing a hearing before the notice of decision is issued, the hearing remains distinct from the personal answer." Thus, it is left to the agency to determine whether the hearing is held prior to or after the notice of original decision. HUD implementation of the Civil Service Commission regulations state in HUD Handbook 771.3 Revised, Paragraph 14 (f) that the employee will be notified of his entitlement to a hearing in connection with the proposed adverse action prior to the notice of original decision. Exceptions to this are that,

"If the circumstances relating to the proposed adverse action are such . . . that the charges are based on a job related criminal indictment . . . the Assistant Secretary for Administration may authorize postponement of the hearing until after the issuance of the notice of original decision." *In your case, the decision has been made to postpone the hearing* until after the notice of decision. In your reply, you also requested that you be carried in a non-duty pay status pending decision on the Department's proposal. You have been carried in a non-duty pay status during this period. The reason stated in the notice of July 15, 1974, is sustained. This is to inform you that you are to be suspended indefinitely effective August 13, 1974. Your reply also requested that if you were suspended you be carried in a non-duty pay status during the suspension. Due to regulations, we are not able to grant this request. Furthermore, you should be aware that the outcome of your indictment, and/or review by the Department as a result of your indictment may warrant further adverse action, including removal.

You have the right to appeal the foregoing decision by appealing to the Department of Housing and Urban Development or to the Atlanta Regional Office of the U.S. Civil Service Commission, or first to HUD and then to the Commission.

If you appeal first to the Commission, you will have no right of appeal to HUD. In order for your appeal to be considered by the Commission, it must (1) be in writing (2) give your reasons for contesting the foregoing decision, with such offer of proof and pertinent documents as you are able to submit; and (3) be submitted no later than 15 days after the effective date of the foregoing action.

If you appeal first to HUD, you will not be entitled to appeal to the Commission until after a decision on your

appeal to HUD is made. If, however, no decision on the appeal has been made within 60 days after it was filed, you may elect to terminate your appeal to HUD by appealing to the Commission.

You are entitled to a hearing before an examiner in connection with this appeal. An appeal to HUD should be directed to the Assistant Secretary for Administration, Thomas G. Cody, 451 7th Street, S.W., Washington, D.C. 20410. It must (1) be in writing; (2) give the basis for the appeal; (3) state whether you desire a hearing in connection with your appeal; and (4) be submitted no later than 15 calendar days after the effective date of this action. You may obtain information on how to pursue an appeal by contacting Charles H. Aikens, Jr., Personnel Officer, (404), 526-5566.

This notice has been prepared in accordance with the regulations of the U.S. Civil Service Commission and implemented by HUD Handbook 771.3 Revised, *Adverse Actions and Appeals.* These as well as other pertinent statutes and Commission regulations, are available for review upon submission of a request to this office.

If you have any questions concerning the procedures and/or regulations applicable to this action, you may contact Charles H. Aikens, Jr., Personnel Officer, at (404) 526-5566.

(signature illegible)
Regional Administrator

Receipt Acknowledged_____ Date _____

MEMORANDUM

TO: E. Lamar Seals, Office of Regional Administrator

FROM: Ralph E. Koontz, Jacksonville Area Office

SUBJECT: Response to Notice of Proposed Indefinite Suspension

REF: Your Memo 4 AP dated July 15, 1974

1. In view of the relatively insignificant and not illegal act of which I am charged in the indictment served against me about July 10, 1974 in Case Number 74-122-CR-J-S, U.S. District Court, Middle District of Florida, Jacksonville Division, it is requested that my suspension be deferred until I am afforded an opportunity for hearing in accordance with applicable Civil Service regulations, or at least in the alternative that I be carried in a non-duty status pending decision on the Departments proposal.

2. The only overt act of which I allegedly committed in an alleged conspiracy was to give to Larry Williams a list of persons doing business with HUD. It is submitted that this act was not illegal or unauthorized by regulation or law; that such information was available to the public and could properly be given to any person seeking it. All other allegations are so vague, indefinite and ambiguous as to make it impossible at this point for me to respond to.

3. I deny that I did anything wrong or unlawful and consider it grossly unjust and unfair that I be indefinitely suspended without pay and without a hearing on the basis of such a flimsy alleged wronhful act. To be summarily suspended without pay and without a hearing as provided by law, would be a denial of due process.

4. It is therefore respectfully requested that if the Department considers it in the best interest of good morale or effective service that I remain suspended that it be in a nonduty pay status.

/s/ Ralph E. Koontz

[Seal]

THE SECRETARY OF HOUSING AND
URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

November 21, 1975

MEMORANDUM FOR: Ralph M. Koontz
Assistant to the Director
Jacksonville Area Office, 4.6SA

Subject: Restoration of Salary and Other Benefits After Suspension

This is in reply to your memorandum of October 6, 1975, requesting restoration of the pay, annual leave, sick leave, and any other employment benefits withheld from you during the period of your indefinite suspension that ran from August 13, 1974, through August 6, 1975.

In other cases similar or identical to your own, it has been the Department's position that an indicted employee who is suspended based upon the fact of his indictment, and who is subsequently returned to duty status effective the date of his acquittal, or the date on which his indictment is dismissed, does not have entitlement to the restoration of pay and employment benefits withheld from him during the period of his suspension. This position was not taken arbitrarily, but was and is based upon the Back Pay Act of 1966 (5 U.S.C. 5596) as implemented by regulations prescribed by the U.S. Civil Service Commission.

For your information, our legal position is currently being tested in the U.S. Court of Claims in the case of *Jankowitz v. U.S.* (Ct. Cl. 83-75).

/s/ Carla A. Hills

September 4, 1975

Honorable Elmer B. Staats
Comptroller General
General Accounting Office
Washington, D.C.

Gentlemen:

Please treat this letter as my formal request for immediate remuneration for all back pay and all other accompanying benefits as a GS-14-10, Civil Service Employee of the Jacksonville Florida Area Office of the United States Department of Housing and Urban Development.

I was indicted on July 10, 1974, charged with the crime of conspiracy and was relieved of all duties and all pay suspended shortly thereafter.

This suspension was maintained until the time of the trial in Tampa, Florida, beginning on February 24, 1975, and all times thereafter to and including August 6, 1975. The jury returned a verdict of acquittal and I was reinstated verbally on the same date. I reported to work at the Jacksonville Area Office effective August 6, 1975.

Accordingly, please treat this letter as a formal request for all things outlined in paragraph one above. I would appreciate it if you would refer this letter to the proper authority in the Civil Service Commission and Department of Housing and Urban Development and advise me with all convenient speed as to their disposition.

Sincerely,

/s/ Ralph Koontz
Department of Housing &
Urban Dev.
Jacksonville Area
6661 Riverside Avenue
Jacksonville, Florida

cc/ Secretary Carla Hills
Department of Housing & Urban Development
Washington, D.C.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C.

[Seal]

OFFICE OF THE ASSISTANT SECRETARY FOR ADMINISTRATION

IN REPLY REFER TO
APR

November 26, 1975

Mr. H. J. Shahan
Chief, Payment Claims Branch
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Shahan:

This refers to your letter of November 4, 1975, transmitting a claim for back pay (file reference: Z-2609247-CSS/HJS) received in your office from the claimant, Ralph M. Koontz.

We have given prior consideration to this claim and have disallowed it based upon provisions of the Back Pay Act of 1966 which – for the Act's application – require, among other things, a finding that claimant's suspension was "an unjustified or unwarranted personnel action." Since the claimant's suspension was properly based exclusively upon the fact of his indictment and not any charge or charges, it does not appear that his subsequent acquittal requires the retroactive cancellation of his suspension, or even permits what would be a prerequisite finding that it was "unjustified or unwarranted."

The Department's position on this matter is presently being tested in the U.S. Court of Claims in the case of *Jankowitz v. U.S.* (Ct. Cl. 83-75). Accordingly, as requested in your letter, the original claim is returned here-

with. Mr. Koontz was apprised of the Department's position on this matter by memorandum from Secretary Hills, dated November 24, 1975 (copy enclosed).

Sincerely,
/s/ Norman S. Linton
J. C. Curvey
Director of Personnel

Enclosures
cc: Mr. Ralph M. Koontz

BACK PAY ACT OF 1966
5 U.S.C. §5596.

§5596. Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means–

(1) an Executive agency;

(2) The Administrative Office of the United States Courts:

(3) The Library of Congress;

(4) The Government Printing Office; and

(5) The government of the District of Columbia.

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee–

(1) is entitled, or correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period except that–

(A) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Civil Service Commission, and

(B) annual leave credited under subparagraph (A) of this paragraph but unused and still available to the employee under regulations prescribed by the Commission shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(c) The Civil Service Commission shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees.

As amended Pub.L. 94-172, § 1(a), Dec. 23, 1975, 89 Stat. 1025.

LLOYD-LAFOLLETTE ACT
5 U.S.C. §7501

§7501. Cause; procedure; exception

(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to—

(1) notice of the action sought and of any charges preferred against him;

(2) a copy of the charges;

(3) a reasonable time for filing a written answer to the charges, with affidavits; and

(4) a written decision on the answer at the earliest practicable date.

Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing the answer, the reasons for and the order of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission.

(c) This section applies to a preference eligible employee as defined by section 7511 of this title only if he so elects. This section does not apply to the suspension or removal of an employee under section 7532 of this title. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 527.

EXCERPTS FROM
FEDERAL PERSONNEL MANUAL SUPPLEMENT

Subchapter S3. Merit of Adverse Action

S3-2. Insufficient Cause

a. *Pitfalls to avoid.* Agencies should be alert to avoid such errors as the following:

(1) *Cause based on fact of arrest.* Generally, the mere fact that an employee was arrested for a crime does not provide a cause for taking adverse action against the employee, even though the evidence of the arrest is fully recited and established. The employee may be innocent of the crime for which he was arrested. The agency action should be based, not on the fact of the arrest, but on the misconduct that led to the arrest, if there is sufficient evidence to provie misconduct or warrant suspension pending further investigation.

(2) *Cause based on criminal indictment.* Except when the agency suspends an employee indefinitely pending disposition of a criminal action, the agency should not base an adverse action on a criminal indictment or conviction. Instead, the agency should base the action on what the employee did that was wrong. If the cause relied on is a criminal indictment or conviction, then a subsequent acquittal of the employee or a dismissal of the criminal charge would, in effect, vacate the cause for action. However, if the cause relied on is the employee's acts of wrongdoing, generally the administrative action will not be affected by the subsequent court action on the criminal case (see S7-1c(2)).

* * *

EXCERPTS FROM FEDERAL PERSONNEL MANUAL SUPPLEMENT

S7-1c(2). Effect of invalid reasons

* * *

c. *Effect of invalid reasons.* (1) Frequently an advance notice contains a number of separate reasons for the agency's proposed action, but the agency decides in the end to sustain only some of these and reject others. When the remaining reasons are valid and sufficient, one or more invalid reasons will no t invalidate an adverse action (see *Baughman v. Green, Deviny v. Campbell,* and *Finnegan v. Daly*). However, when some reasons are invalid, the agency must decide whether the sustained reasons warrant the proposed adverse action or some less severe penalty.

(2) If the reason relied on is a criminal indictment or conviction, rather than the commission of certain stated acts of wrongdoing, then a subsequent acquittal of the employee or a dismissal of the criminal charge will, in effect, vacate the reason for action. On the other hand, if the reason relied on is the employee's acts of wrongdoing, generally the administrative action will not be affected by the subsequent court action on the criminal case (see *Bryant v. U.S., Croghan v. U.S., Finfer v. Caplin, Finn v. U.S., Holman v. U.S. and Prater v. U.S.*). However, the agency should give appropriate weight to testimony given during the criminal trial (see *Kowal v. U.S.*).

* * *

EXCERPTS FROM CODE OF FEDERAL REGULATIONS

§550.803 Determining entitlement.

(a) The requirement for an administrative determination referred to in the phrase "on the basis of an administrative determination or a timely appeal" in section 5596 of title 5, United States Code, is met when an appropriate authority in an agency makes a decision on its own initiative in a case involving an unjustified or unwarranted personnel action. The decision may be oral but shall be confirmed in writing.

(b) The requirement for a timely appeal referred to in the phrase "on the basis of an administrative determination or a timely appeal" in section 5596 of title 5, United States Code, is met when an employee or his authorized representative initiates an appeal under an appeals system or procedure established by law, Executive order or regulation and that appeal is accepted as timely filed by the Government authority administering the appeals system or procedure concerned.

(c) The appropriate authority referred to in section 5596 of title 5, United States Code, and this subpart is (1) the agency or the office or official in an agency authorized under applicable law or regulation to correct, or to direct the correction of, the unjustified or unwarranted personnel action, or (2) a court having jurisdiction to make a determination that a personnel action is unjustified or unwarranted.

(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action

by an authorized official of any agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement) suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

[33 F.R.12458, Sept. 4, 1968, as amended at 34 F.R. 5985, Apr. 2, 1969]

§550.804 Corrective action.

(a) When an appropriate authority corrects an unjustified or unwarranted personnel action, the agency shall recompute for the period covered by the corrective action the pay, allowances, differentials, and leave account of the employee as if the unjustified or unwarranted personnel action had not occurred and the employee shall be deemed for all purposes we have rendered service in the agency for the period covered by the corrective action. In making its computation under this paragraph, an agency shall not include as allowances any amount which represents reimbursement for expenses which would have been incurred by an employee in the performance of his job if the unjustified or unwarranted personnel action had not occurred but which were not incurred because of the unjustified or unwarranted personnel action but shall include other allowances which are a form of remuneration to the employee for services that otherwise would have been rendered in the job.

(b) In recomputing the pay, allowances, differentials, and leave account of an employee under paragraph (a) of this section, the agency shall include the following:

(1) Premium pay which the employee would have received had it not been for the unjustified or unwarranted personnel action;

(2) Changes in pay rates by reason of wage surveys, administrative action, law, or other changes of general application;

(3) Changes in allowance or differential rates;

(4) Within-grade or step increases or other periodic increases which would otherwise have become due;

(5) Changes in pay caused by changes in assigned working shifts;

(6) Changes in the employee's leave earning rate; and

(7) Any other changes which would affect the amount of pay, allowances, differentials or leave which the employee would have earned had it not been for the unjustified or unwarranted personnel action.

(c) Subject to the provisions of paragraph (d) of this section, the period for which recomputation is required under paragraph (a) of this section is the period covered by the unjustified or unwarranted personnel action which is corrected and may not extend (1) beyond the date of the employee's death, or (2) beyond the date on which the employee was properly separated from the rolls of his agency such as by resignation, retirement, removal, reduction in force, expiration of appointment, or transfer to another agency, when the employee continued on the rolls of the agency beyond the date on which the unjustified or unwarranted personnel would have been effected even though action was taken and the separation and unjustified or unwarranted personnel action had not been taken.

(d) In computing the amount of back pay under this section and section 5596 of title 5, United States Code, the agency may not (1) include any period during which the employee was not ready and able to perform his job because of incapacitating illness, except that the agency shall grant upon the request of the employee any sick or annual leave to his credit to cover the period of incapacity by reason of illness, or (2) include any period during

which the employee was unavailable for the performance of his job and his unavailability was not related to, or caused by, the unjustified or unwarranted personnel action.

(e) In computing the amount of back pay due an employee under this section and section 5596 of title 5, United States Code, the agency shall deduct the amounts earned by the employee from other employment during the period covered by the corrected personnel action. The agency shall include as other employment only that employment engaged in by the employee to take the place of the employment from which the employee was separated by the unjustified or unwarranted personnel action.

(f) In computing the amount of back pay due an employee under this section and section 5596(b) of title 5, United States Code, if the employee has been restored within 1 year after his erroneous separation, the agency may not delete any period from computation on the basis that the employee was under obligation to make an effort to secure other employment during the period covered by the unjustified or unwarranted personnel action.

(g) Annual leave which is in excess of the maximum leave accumulation authorized by law is credited to a separate leave account for the use of an employee if reinstated to the rolls. Annual leave in this separate leave account must be scheduled and used by the end of the leave year ending two years after the date of publication of this subpart, or after the date on which the annual leave is credited to the separate account, whichever is later.

(h) Where an employee has taken leave without pay during the period from December 23, 1975, to date of publication of this part, and at the time of such absences had annual leave in a separate leave account pursuant to

section 5596 (b) (2) of title 5, United States Code, but no other annual leave to his or her credit, the agency shall, upon the request of the employee, retroactively apply such annual leave from the separate leave acount to the period taken as leave without pay, and amend such records and pay such monies as are reflective of this action.

[33 FR 12458, Sept. 4, 1968, as amended at 41 FR 16949, Apr. 23. 1976]

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§772.307 Hearings.

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(b) *Right to a hearing.* An appellant is entitled to a hearing before the office of the Appeals Authority having jurisdiction of the appeal. That office shall inform the appellant of his right to a hearing. If the appellant does not desire a hearing, he shall so advise that office in writing.

* * *
